

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

FT EXPRESS,

Plaintiff, : Case No. 3:08-cv-340

-vs-

Magistrate Judge Michael R. Merz

BARKO ENTERPRISES, et al.,

Defendants.

**DECISION AND ORDER DENYING MOTION FOR TEMPORARY RESTRAINING
ORDER AND SETTING HEARING ON MOTION FOR PRELIMINARY INJUNCTION**

This case is before the Court Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction (Doc. No. 32). The Motion is made *ex parte*, Defendants' counsel having been permitted to withdraw on December 7, 2009. The motion is properly before the Magistrate Judge for decision because the case has been referred pursuant to 28 U. S.C. 636(c) upon the unanimous consent of the parties (Doc. No. 18).

Fed. R. Civ. P. 65(b) permits a federal court to "issue a temporary restraining order without written or oral notice to the adverse party only if

- (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
- (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Arguably the Motion complies, at least in part, with Fed. R. Civ. P. 65(b)(1)(B) because the certificate of service indicates attempts to at least make service on the corporate Defendant.

However, the Motion does not comply with Fed. R. Civ. P. 65(b)(1)(A) because it is not supported by an affidavit attesting to any of the facts on which the Motion is based. In particular, the Court notes that there is no proof of authenticity of the regular First National Bank statements offered to show that the amounts in the disputed account as of various dates are different from the amounts shown on interim statements of the account. Particularly disturbing facts are alleged to be shown by an Exhibit 8 which is not attached. Accordingly, the Motion for Temporary Restraining Order without notice is denied.

The Motion for Preliminary Injunction is set for hearing in Courtroom No. 4, 200 West Second Street, Dayton, Ohio 45402, at 9:30 A.M. on Thursday, December 17, 2009.

December 8, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge